Municipal Regulation of Land Use

Massachusetts Town Clerk's Association

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Presented by
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THE LEADER IN PUBLIC SECTOR LAW

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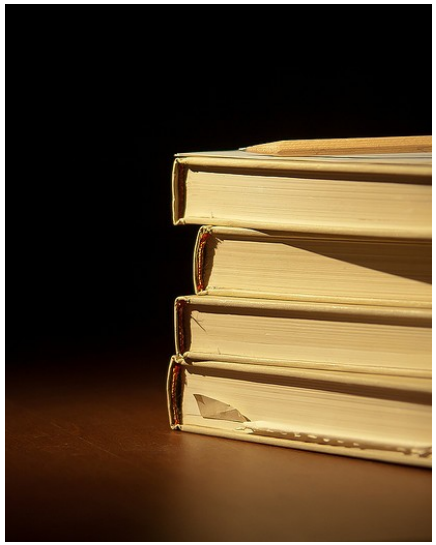
Chapter 40A

Massachusetts General Laws Chapter 40A The Zoning Act



The Zoning statutes date back to 1920

Chapter 40A Codified as a chapter in 1954

The version we follow today dates from 1975

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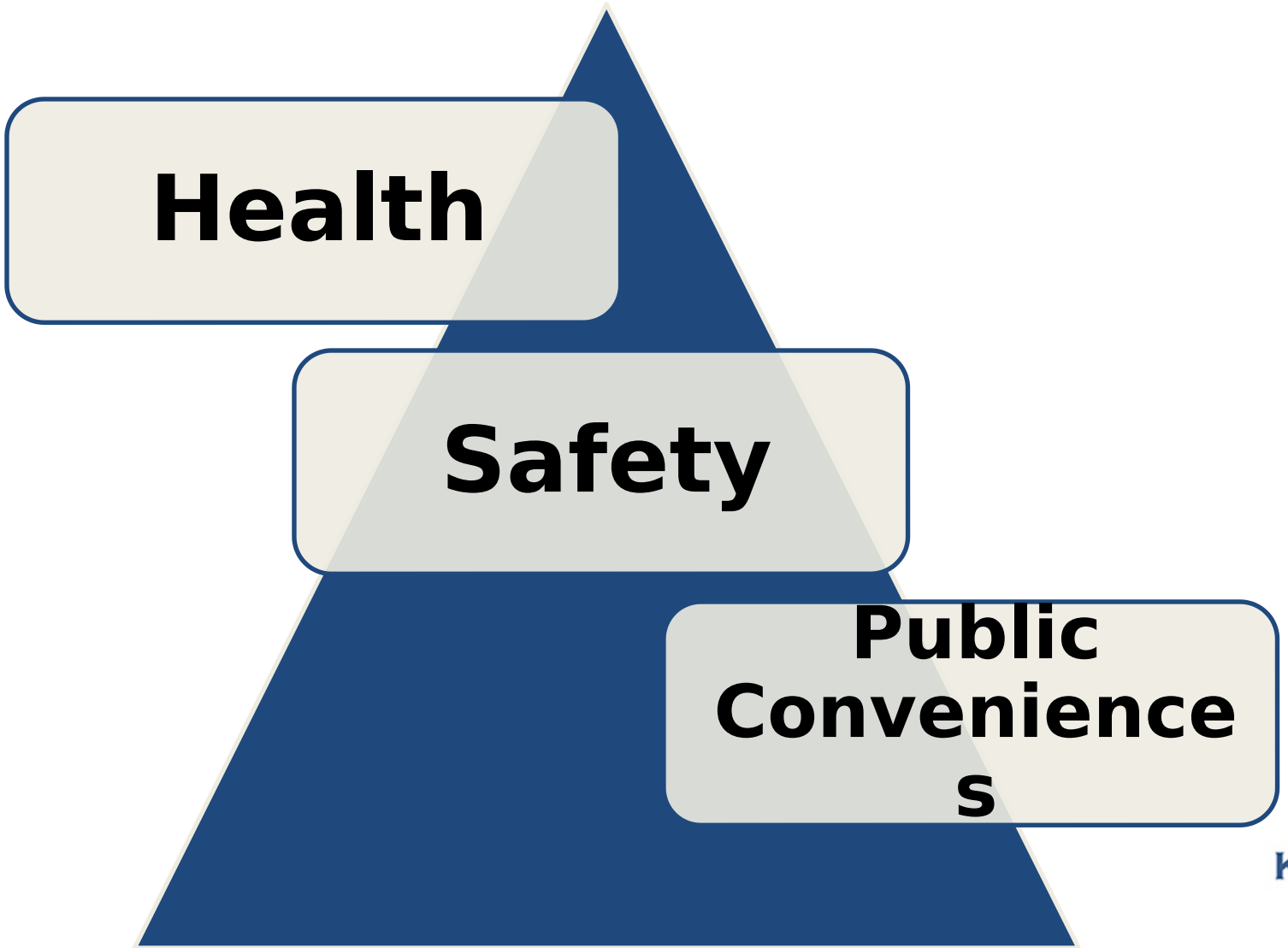
Purpose of the Act

What does the Zoning Act do?

- Establishes consistent statewide framework for regulation of land uses
- Encourages adoption of modern zoning bylaws in compliance with MA Constitution
- Provides standardized procedures to administer municipal zoning laws
- Provides municipalities with building blocks to help each community shape and preserve its character by encouraging the appropriate uses of land

Goals of the Act



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Goals of the Act

Transportation, water, light and air

Sewerage and drainage

Schools, parks, open spaces

Prevent blight and pollution

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Achievement of Goals

- Zoning districts with boundaries
- Uses of land and structures for each zoning district
- Dimensional requirements
- Conditions under which uses may be permitted

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Administration of Act

- Adoption of municipal zoning (either ordinances or bylaw, referred to here as “bylaws”)
- Issuance of various types of permits
- Identify permit or “special permit granting authority”, also known as the SPGA, designated by Zoning Bylaw

Administration of Act

- In addition to authority granted by Zoning Bylaws, the ZBA and Planning Board exercise authority under state law
- ZBA:
    - Variances
    - Appeals from Building Inspector
    - Comprehensive Permits
- Planning Board
    - ANR Plans and Subdivision Control Law
    - Zoning Amendments

Special Permit Granting Authorities

Typically: Planning Board
or Zoning Board of Appeals

Sometimes: Board of Selectmen

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Rules for Conducting Business

- SPGA adopts rules relative to the issuance of special permits addressing size, form, content, type and number of copies of plans and specifications and the procedure for submission of applications and approval of permits.
- ***A copy of these rules and any amendments must be filed with the municipal clerk***.
- If board of appeals is also a SPGA, a single set of rules may be filed covering variances, special permits and appeals.
- ***If, however, there is a separate SPGA, clerk should receive two sets of rules, one from the board of appeals and another from the SPGA***

Role of the Clerk

- The clerk has the following general duties in relation to Chapter 40A and the functions of the board of appeals, zoning administrator and SPGA.
  - Receive, file and transmit documents
  - Issue a variety of certificates and certified copies.
    - Note that it is not the responsibility of the town clerk to transmit a copy of applications to the special permit granting authority
  - Whenever a document is filed with the clerk under Chapter 40A, it must be time stamped or that the date and time of receipt be noted on the document.
  - In many cases, the time frames in which certain actions must be taken, including holding hearings, making decision, and taking appeals, are calculated from the date of the filing with the clerk.

Role of the Clerk

- It is also important that clerk be familiar with the municipality's zoning bylaws, as the bylaws:
  - Address various issues, including appointment of zoning administrator and/or zoning enforcement agent, board or boards that will act as SPGA, types of special permits each may grant, whether use variances can be granted, etc.
  - While zoning bylaws must be consistent with the Chapter 40A, some variations in specific provisions are allowed, and it is useful to know if there are any particular provisions requiring action by clerk.

Public Hearing Process

- A copy of the hearing notice must be filed with the clerk.
- Hearing notice must be maintained with application, plans, to ensure complete file.

Public Hearing Process

- Board of appeals responsible for compliance with notice requirements with respect to publication, mailing of copies to individuals and officials and posting. These requirements apply to all public hearings held by the board of appeals.
- Regardless of law, clerk often responsible for posting on official bulletin board, or has hearing and meeting notices posted in office.

Public Hearing Process

- Advertise and post 14 days prior to hearing
- Notices mailed to “parties in interest” per certified abutters’ list from Assessor
- Waiver of notice
- Comply with Open Meeting Law – regardless of notice required for public hearing, must also post under OML

Public Hearing Process

- The board of appeals must hold a public hearing on each application received within 65 days from the date of transmittal.
- The date of transmittal will ordinarily be the same date the application was submitted (clocked in).
- However, if application was submitted just before clerk office closing time, it may not be transmitted until the following day and the later date determines the deadline for the hearing.
- A best practice for applicants is to include the date of transmittal to the SPGA as well as the submission date to the clerk.

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Decisions Generally

- The time within which a decision must be made starts with the date of filing (time stamping), NOT the date of transmittal, if different.
- A decision related to a special permit must be made within 90 days following the PUBLIC HEARING.
- A permit to enlarge or extend a pre-existing nonconforming structure or use is considered a special category of special permits, and the deadline for making the related decision is the same.
- ***In addition, the board must also file a copy of its decision with the clerk within this 90 day period.***
- All other decisions must be made within 100 days after the date the application was FILED with the town clerk.
- ***The board of appeals must file with the clerk notice of ANY decision, either granting or denying an application, within 14 days of the decision***

Decisions Generally

- No variance or special permit, or any extension, modification or renewal thereof, shall take effect until a copy of the decision, ***bearing the certificate of the clerk with respect to appeals*** is recorded in the Registry of Deeds for the county and district in which the land is located.
  - The fee for recording must be paid by the owner or applicant.
- ***The clerk's certificate must state that 20 days have elapsed after the copy of decision was filed and that no notice of appeal has been filed, or, if a notice of appeal was filed, the certificate must state that the appeal has been dismissed or denied.***

Adopting & Amending Zoning Bylaws

Chapter 40A, Section 5

New Bylaw or Amendment is proposed by:

- Chief Executive (Board of Selectmen or City Council)
- ZBA
- Property Owner whose land is affected
- Planning Board
- Regional Planning Agency
- Petition by 10 Registered Voters

Adopting & Amending Zoning Bylaws

- Proposal filed with City Council or Board of Selectmen and referred within 14 days to Planning Board
- Planning Board public hearing held within 65 days; also in a city, city council hearing
- Advertise, post and, as appropriate, mail notice of public hearing:
  - Advertisement: notice of time and place, subject matter "sufficient for identification" and place where text and maps may be inspected, published in a newspaper of general circulation once in each of two successive weeks, the first not less than 14 days before hearing
  - Posting, in city or town hall, for not less than 14 days before day of hearing
  - Notice of sent by mail, postage DHCD, regional planning agency, if any, and to planning board of each abutting city and town
- Planning Board issues report with recommendation within 21 days of hearing

Adopting & Amending Bylaws

- Towns – vote at annual or special Town Meeting
- Cannot be acted upon unless: (1) Planning Board has issued a report/recommendation; or, (2) 21 days has passed since Planning Board hearing
- 2/3 vote required to approve, with limited exceptions for majority votes.
- If unfavorable action taken, bylaw cannot be considered again for two years unless favorably recommended by Planning Board

Adopting & Amending Bylaws

- Planning board report - Unless more than 21 days have elapsed between date of the hearing and date of town meeting planning board must submit report to town meeting, by:
  - Having report printed in warrant or with backup provided with warrant (typical for representative town meeting)
  - Submitting written report to meeting in form of handout
  - Submitting written report to moderator or clerk
  - Providing verbal report at meeting
- A copy of any written planning board report must be included in clerk's submission to Attorney General of zoning bylaw amendments to Attorney General, and/or clerk will be asked to verify that a required report was given

Adopting & Amending Bylaws

Prior nonconforming status

Zoning changes do not apply to:

- Uses and structures lawfully in existence or lawfully begun
- A building or special permit issued prior to date of first publication of public hearing but does apply to substantial changes
- Any alteration to a single- or two-family residence which does not increase the non-conforming nature of the structure

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"Prior Nonconforming Uses"

- Uses that lawfully exist prior to the adoption of a zoning Bylaw may continue
- Expansion, alteration, or intensification requires zoning relief
- Protection can be lost if significant change in nature and character of use

Uses

- Zoning bylaws must identify and define what uses are:
  - allowed “by right”
  - Prohibited
  - Exempt
  - allowed by special permit
  - subject to site plan review
- Zoning bylaws also address whether variances may be granted and whether and what “findings” may be required to support the same.

Exempt Uses

Chapter 40A, Section 3

- So-called “Dover Amendment” uses
- Cannot require a special permit or unreasonably regulate certain uses

Exempt Uses Include:

- Commercial agriculture
- Religious purposes
- Education purposes
- Child care facilities

Variances

Chapter 40A, Section 10;

- ***Application filed with Clerk***
- Good practice for board of appeals to distribute copies to other boards or departments for review and comment
- Application may be withdrawn without prejudice (with ZBA approval after hearing has been opened)

Variances

ZBA Conducts Public Hearing

- ***Written decision filed with clerk within 14 days of decision***
- Copy of decision provided to applicant/property owner
- If granted, variance does not take effect until 20 days after decision filed with clerk and no appeal, or appeal dismissed or denied ***as certified by clerk***.
- Variance could also take effect by “constructive approval”
- Decision must be recorded at registry of deeds

Variances - Granted

- Allows use (if authorized) or structure otherwise prohibited
- Granted only upon satisfying statutory criteria
  - Shape of lot
  - Soil of lot
  - Topography of lot
  - Specific to subject lot and not generally applicable to district
  - Literal enforcement would impose hardship
  - Not a substantial detriment to public
  - Does not nullify or substantially depart from bylaw

Dimensional v. Use

Dimensional v. Use Variance

Dimensional: varying physical parameters

Examples: setback from lot line, height, square footage

Use: allowing a use in zoning district where otherwise prohibited

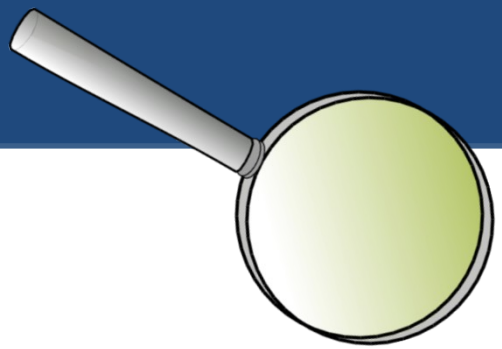
Examples: allowing hotel/motel in AR zoning district

- May only be granted if Zoning Bylaws specifically allow

Extensions and Lapses

- Variances may be extended up to 6 months
- Lapse if not “exercised” within 1 year of date granted
  - More than recording at registry of deeds
  - Must take some action in reliance upon variance

"Findings"



Chapter 40A, Section 6,

- Pre-existing nonconforming structures and uses
- Burden is on applicant to demonstrate "preexisting" status—i.e. that structure, lot or use at issue predates zoning requirements at issue
- Alterations permitted if ZBA finds that alteration is not substantially more detrimental than original structure or use
- If new nonconformity, variance also required

Site Plan Review

Not found in Chapter 40A but widely used tool to review project at an early stage, determine if appropriate in terms of location and scale, identify impacts; exact form varies from municipality to municipality

Site Plan Review

- May apply in conjunction with uses allowed by right or uses allowed by special permit
- Application reviewed and approved prior to
granting other required permits
- Preliminary site plan reviewed by various departments and boards, who may offer comments, identify concerns and may suggest changes

Special Permits

Chapter 40A, Section 9;

- Application filed with clerk
- SPGA advertises and mail notices of public hearing (Same as for variance or appeal)
- After advertisement, application may be withdrawn with or without prejudice only with SPGA approval
  - With prejudice means application denied for purposes of repetitive petition

Special Permits

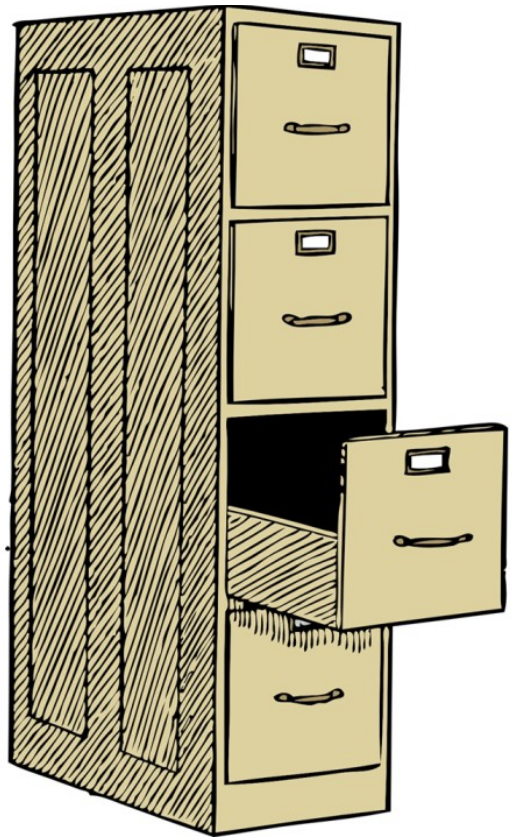
- Public hearing within 65 days of application
- Decision made within 90 days following conclusion of public hearing and filed with Town Clerk within 14 days thereafter, or deemed “constructively approved”
- Approval must be recorded at registry of deeds
- Lapse within up to 3 years if not exercised or extended
  - If substantial use or construction has not been made, except for good cause
  - Excludes time for appeal

Special Permit - Discretionary

No entitlement to special permit

- Allows for special uses upon satisfaction of criteria, if use is in harmony with purpose and intent of bylaw
- Allows more flexibility/creativity
- SPGA may impose reasonable conditions

Special Permit Decisions



- **Must be voted and filed within 90 dates of date of public hearing**
- ***Must be filed in office of clerk within 14 days of decision made; *time stamp decision when filed****
- **Must be recorded at registry of deeds**

Appeals

Chapter 40A, Section 17

- Must be filed with court within 20 days of date decision filed with clerk
- To overturn, court must find ZBA acted arbitrarily, and decision was not legally tenable
- If decision reasonable under bylaw, court will uphold
- court may remand back to ZBA

Repetitive Petitions

G.L. c.40A, Section 16

- If variance or special permit is denied, applicant cannot re-apply for 2 years, **unless:**
  - finding by permit granting authority by a unanimous vote of three member board, or four out of five members of a five member board, or 2/3 vote of a board of more than five members, **AND**
  - notice is given to parties in interest of date, time and place of when proceedings for this determination

Appeals

- All applications for action to be taken by the board of appeals must be submitted to the clerk.
- Clerk should accept for filing all applications presented since it is the responsibility of the board of appeals to determine whether an application has been submitted by a proper person and has been properly completed.

Subdivision Control

"The subdivision control law has been enacted for the purpose of protecting the safety, convenience and welfare of the inhabitants of cities and towns in which it is, or may be, put into effect by regulating the laying out and construction of ways in subdivisions providing access to the several lots therein, but which have not yet become public ways, and ensuring sanitary conditions in subdivisions and in proper cases parks and open areas."

MGL c. 41, § 81-M

Subdivision Control

- 1907 and 1916 – legislation for “boards of survey” to regulate the construction of ways (no power to regulate division of land abutting such ways)

- 1936 – local acceptance legislation for an approved method of municipal planning and could regulate subdivisions

- 1953 – The Subdivision Control Law, MGL c. 41, § 81K-81GG enacted

Types of Subdivisions & Plans

Types of Subdivisions

- Conventional Subdivision
- Cluster/Open Space Residential Development

Types of Plans

- Preliminary plans
- Definitive plans
- ANR plans

****notice of submission of plans must be provided to clerk by hand delivery or**

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Preliminary Subdivision Plans

- Designed primarily to open negotiations between the planning board and the applicant
- An applicant proposing a non-residential subdivision must submit a preliminary plan
- A preliminary plan is not recorded at the registry of deeds
- An applicant or interested party has no right to appeal a decision on a preliminary plan

Definitive Subdivision Plans

- This is the formal, working document for the creation of new lots and roadways
- The form and contents of the definitive plan are defined by the rules and regulations of the planning board
- If the plan is not in compliance with its rules and regulations, or the recommendations of the board of health, the planning board must disapprove or modify the plan to bring it into compliance and then approve the plan
- Applicants must send any request for reduction in surety to planning board and clerk by registered mail

Definitive Subdivision Plans

- Definitive plan can be submitted at a regular meeting of planning board or sent by registered mail to planning board, with notice of the filing to the Town Clerk.
- If the plan is mailed, date of receipt by Planning Board is date of submission
- The planning board may approve, modify and approve, or deny plan.
- Definitive plan must be recorded at registry of deeds within 6 months from date of endorsement
- If a definitive plan is not recorded at the registry of deeds within 6 months of planning board endorsement, plan cannot be recorded without certificate of clerk that approval has not been modified, amended, rescinded, or changed.

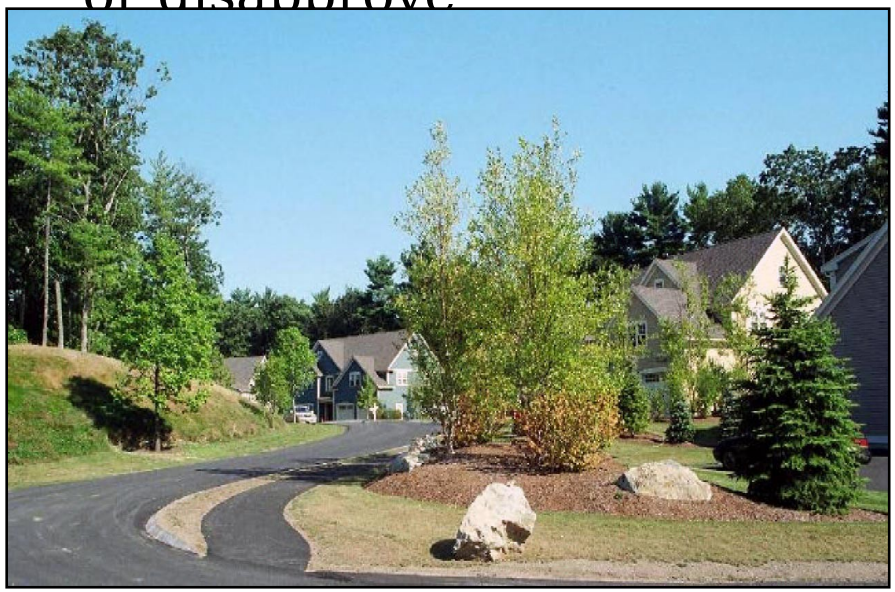
Planning Board Rules and Regulations

- Planning Board solely responsible for adopting regulations
- A true copy must be kept on file in the office of the planning board and filed with and maintained on file with clerk
- A copy must be filed with register of deeds and recorder of Land Court

Subdivision Plans - Timelines

Preliminary Plan

- No public hearing required
- 45 days to approve, approve with modifications or disapprove



Definitive Plan

- Plan to be submitted to board of health – 45 day response period
- PB public hearing required
- For **nonresidential plan**, or **residential subdivision with preliminary plan**, **final action required within 90 days of submission**
- For **residential subdivision with no preliminary plan**, **final action required within 135 days of submission**

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Approval Not Required (ANR)

- Frontage – Must meet frontage requirement of local bylaw or ordinance.
- Access – Must provide vital access to the lot thru one of these ways:
  - Public way or a way that is used and maintained as a public way; or
  - Way shown on approved subdivision plan; or
  - Way in existence when the subdivision control law took effect in municipality, which way is, in the opinion of the planning board, suitable for proposed use of lots.

ANR Plans

- No public hearing required
- Planning Board has 21 days to endorse the plan which includes giving written notice to the municipal clerk
- Constructive approval issue if no action within 21 days
- Planning Board cannot rescind an ANR endorsement.

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Constructive Approval

- Any agreement for extension of time must be in writing and filed with clerk.

In the case of a residential subdivision plan where a preliminary plan was submitted – within 90 days from the date of submission of definitive plan

- Record planning board's certificate of action with the clerk.

- Once plan constructively approved, any vote to deny plan is a nullity.

Constructive Approval

Nonresidential subdivision plan – constructive approval occurs if no action taken within 90 days from date of submission of definitive plan

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Constructive Approval

- Residential subdivision plan where a preliminary plan was submitted – constructive approval occurs if no action taken within 90 days from date of plan submission
- Residential subdivision plan where no preliminary plan was filed – constructive approval occurs if no action taken within 135 days from date of plan submission

Performance Guarantees

- By a bond
- By a deposit of money or negotiable security
- By a covenant
- By an agreement whereby lender retains funds
- Applicant must send request for reduction in surety to planning board and clerk by registered mail

Questions?

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